

SERVED: May 26, 1993

NTSB Order No. EA-3885

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 11th day of May, 1993

JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11365
v.	)	
	)	
MARC C. STERN,	)	
	)	
Respondent.	)	
	)	

**OPINION AND ORDER**

Respondent appeals from the decision of Administrative Law Judge William A. Pope II, issued at the conclusion of an evidentiary hearing, affirming an order of the Administrator suspending respondent's Airline Transport Pilot Certificate for 30 days.<sup>1</sup> The law judge found, based on credibility determinations made at the hearing, that respondent violated

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<sup>1</sup>The oral initial decision, an excerpt from the transcript, is attached.

sections 91.75(b), 91.87(h), and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.<sup>2</sup> The Board now affirms the decision of the law judge.

The Administrator's Order of Suspension alleged, in pertinent part, the following facts:

1. You are the holder of Airline Transport Pilot Certificate No. 076382871.
2. On or about June 27, 1989, you acted as pilot-in-command of a Piedmont Airlines Fokker F-28 aircraft, identification no. N496US, on a flight in the vicinity of Binghamton/Edwin A. Link Field-Broome County Airport, Binghamton, New York.
3. During the above-described flight, you were instructed by Air Traffic Control (ATC) to hold your position on the main ramp.

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<sup>2</sup>FAR sections 91.75(b), 91.87(h), and 91.9 provided in pertinent part at the time of the incident as follows:

"§ 91.75 **Compliance with ATC clearances and instructions.**

\* \* \* \* \*

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

"§ 91.87 **Operation at airports with operating control towers.**

\* \* \* \* \*

(h) Clearances required. No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway, or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point."

"§ 91.9 **Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

4. Notwithstanding the above-described instruction, you exited the main ramp and entered onto the main ramp taxiway without authorization from ATC.

5. As a result of the above, another aircraft bound on taxiway "Charlie" had to be instructed to hold short of the next intersection.

The evidence adduced at the hearing was conflicting as to whether the respondent crossed the double yellow line at Binghamton Airport in New York, which separates the ramp area, a non-movement area, from the taxiway, a movement area, without the necessary clearance from air traffic control. The law judge, in the initial decision, weighed the testimony of the respondent and the first officer on the flight, to the effect that the plane had not crossed the line, against that of the air traffic controller who witnessed the incident and maintained that it had crossed the line. The law judge considered such factors as the controller's disinterested status and the consistency of his testimony with the tower tape.<sup>3</sup>

Although respondent's appeal purports to challenge the adequacy of the evidence underlying the violations sustained by the law judge, respondent recognizes that in order to demonstrate that the evidence was insufficient, he must persuade the Board to overturn the law judge's credibility determinations. Respondent also recognizes that there is a high standard that he must meet

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<sup>3</sup>The law judge specifically found, ". . . no other reasonable explanation for why [the controller] would instruct Piedmont Flight 1851 to taxi to the left to the north ramp and practically in the same breath tell Pocono 7640 to hold short of the next intersection other than Piedmont Flight 1851 was blocking the intersection between the taxiway in front of the main gates and taxiway Charlie." TR 151-52.

to persuade the Board to reverse a credibility determination as the Board will only do so when extraordinary circumstances exist, such as when a witness' testimony is "inherently incredible."<sup>4</sup> We find no basis for disturbing the law judge's resolution of credibility issues in this case.

Although the controller's testimony had some inconsistencies, perhaps due to the passage of time, the law judge found it more credible than that of the respondent and the first officer.<sup>5</sup> Despite full consideration of the respondent's disagreement with that finding, we do not agree that the controller's testimony was inherently incredible or otherwise should have been rejected.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require that the Administrator's order be affirmed in its entirety. We adopt the law judge's findings as our own.

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<sup>4</sup>See *Chirino v. NTSB*, 849 F.2d 1525, 1530 (D.C. Cir. 1988); *Administrator v. Powell*, 4 NTSB 642, 644-45 (1983).

<sup>5</sup>See *Administrator v. Gurley*, NTSB Order No. EA-3218 (1990) (finding the testimony of a disinterested witness more credible than that of fellow employees, and finding that a witness' testimony need not be correct in all aspects to be credible).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 30-day suspension of the respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.<sup>6</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member HART did not concur and submitted the following dissenting statement.

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<sup>6</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

DISSENTING STATEMENT BY ME-3  
FOR NOTATION NO. 5983  
May 13, 1993

Dissent by Member Hart: I would grant respondent's appeal. The issue is whether respondent taxied without authorization and caused the controller to instruct another aircraft to hold short to avert an accident. Because the controller was able to remember so little during the trial, the law judge states that:

Based on [the ground controller's] uncorroborated testimony in this case, I would find that his testimony alone . . . is insufficient to meet the Administrator's burden of proving the allegations by preponderance of the evidence. But for the fact that [the ground controller's] testimony was corroborated by the tower tape recording on one central and key point, I would dismiss the Administrator's case (Tr. 150) .

I agree with the law judge that the controller's testimony alone was not sufficient to carry the Administrator's burden of proof. I do not agree, however, that the tower tape corroborates the controller's testimony regarding the "one central and key point," which relates to the following controller instructions:

[Respondent], I can't do [what you request], sir. Taxi to your left. Bear to your left and taxi to the north ramp. Pocono 7640, hold short of the next intersection.

Regarding those instructions, the law judge concludes:

I find no other reasonable explanation for why the ground controller would instruct [respondent] to taxi to the left to the north ramp and practically in the same breath tell Pocono 7640 to hold short of the next intersection other than [respondent] was blocking the intersection between the taxiway in front of the main gates and taxiway Charlie (Tr. 151-2).

The "preponderance of the evidence" standard of proof requires the Administrator's proffered version of the disputed facts to be more likely than not. However, the tower tape reveals a complete lack of any urgency in the controller's voice when the above-quoted north ramp clearance was given or thereafter, or any other comment or indication that anything was wrong. Thus, although I agree that, but for the tower tape, the appeal should be dismissed, I do not agree that the tower tape demonstrated that the most reasonable explanation for the immediacy of the controller's instruction to Pocono 7640 was that respondent was where he should not have been.

To the contrary, I think that another very reasonable, if not more reasonable, explanation is that the controller had just cleared respondent to go to the north ramp, and he wanted to keep Pocono 7640 clear. Having begun his instructions regarding the relative movements of the two aircraft, the controller may have wanted to complete all of the instructions regarding those movements before diverting his attention to something else. Completing all of the related instructions once the first instruction has been given is a commendable practice that avoided the need to remember to tell Pocono 7640 later where to go, which also avoided the potentially hazardous possibility of being distracted by something else or otherwise later forgetting to give Pocono 7640 the necessary guidance.

Because I agree with the law judge that, but for the tower tape, the appeal should be dismissed, my disagreement with the law judge does not involve a credibility assessment -- for which our burden of reversal is appropriately very high. Instead, the issue is whether the tape makes the Administrator's version of the facts more likely than not, and I do not agree that the tape does.